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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 611

JOE MALOY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF

Joe Maloy,
P. O. Box 251,
Malone, Florida,
Petitioner.

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Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of Joe Maloy respectfully shows to this Honorable Court:

A

Concise Statement of the Case Involved

Joe Maloy was arrested for the offense of driving while under the influence if intoxicating liquor under the laws of the State of Florida, on May 7, 1949, and placed in the County Jail of Polk County, Florida, under a $500 bond. On December 13, 1949, he was tried and convicted in the Criminal Court of Record in and for Polk County, Florida, and sentenced to pay a $100 fine or serve 90 days in jail.

At the time of his arrest, he was returning a truck with which he had pulled his car out, having merely missed the road and gone into a ditch, in turning too sharply off the Tampa Highway onto the Nichols Cut Off, by two deputies who had first stopped his wife, driving his car ahead of him, and ascertained from her that it was the car which had been in the ditch and he had been driving it; there was no accident nor any damage; up to the time of his arrest, he had drank four bottles of beer—one about 4:30 that afternoon, two while having dinner with Mr. and Mrs. Sam Strange, between 6:30 and 8 o'clock p. m., and another about 10.

At the trial he pleaded "not guilty" and waived trial by a jury; he was not represented by nor asked if he desired counsel; nor is there any testimony in the record by Joe Maloy in his own behalf; at the conclusion of the testimony of one witness for the State the County Solicitor stated he could not find the other, Ben Howell, and "in order to save time" directed Joe Maloy to proceed by the calling of his witnesses, Sam Strange and Ruth Maloy. (R. 6). Ruth Maloy testified, and pointed out, that her husband was a cripple and had been pushed around like a common criminal by the arresting officers and her testimony is uncontradicted; she was not permitted to testify in detail nor did the presiding Judge make inquiry thereto, nor advise she was not compelled to testify against her husband. (R. 10).

At the conclusion of the testimony of Sam Strange and Ruth Maloy the Court announced: "We'll wait until Mr. Howell comes in and conclude this the minute Mr. Howell gets here." The case was then set aside and recess called. (R. 12). Preceding such recess the Court had decided: "I think for a working man over that period of time might drink four bottles all right, you couldn't do it right close together but over four or five hours." (R. 12). Following such recess the Court made the following findings of law

and fact: "I don't believe a person could drink four bottles of beer and not be guilty of that charge. There's nothing else to do under the circumstances. He realized that he was guilty." (R. 15).

Thereafter, the case was appealed to the Circuit Court and set down for hearing by petitioner before one of the Circuit Judges, and in his order, dated June 29, 1950, affirming the lower court, said Judge recited that it was agreed by the State Attorney the case be referred to him on the record, without argument. (R. 17).

On July 8, 1950, your petitioner filed in his own behalf Notice of Appeal and on August 11, 1950, his record in the Supreme Court.

On Monday, August 21, 1950, the Attorney General filed motion to dismiss on the ground that an appeal would not lie in the Supreme Court and set the same down for hearing on Monday, September 18, 1950, contrary to the rules of Court, providing it be heard the following Monday. (R. 21).

On September 8, 1950, petition for writ of certiorari was filed on the question the trial court had departed from the accepted and usual course of judicial proceedings in that petitioner had been compelled by the County Solicitor to proceed with his case, before the State had concluded its case; that the County Solicitor still claiming he could not find his witness, a recess was called, following which the presiding Judge had completely reversed himself, found petitioner "guilty" "Under the circumstances" and charged him with knowledge of his own guilt; that it appeared from the record he had not been permitted to testify in his own behalf; that after his arrest on May 7, 1949, he had been advised the case had been dismissed, as evidenced by the Information dated July 7, 1949, and had not been tried until December 13, 1949, and that the testimony of the State's witnesses was almost entirely contradictory.

That, inadvertently, he had not complied with the rules and neither had the Attorney General and asked to be heard, because had the motion been set down on the following Monday, he would have been advised of his error and requested an extension; said day being the last day for the filing of his petition. Brief and Notice of Hearing filed same day.

On September 25, 1950, the Court denied the Petition. (R. 22).

On October 10, 1950, petition for re-hearing was filed by James Nemec, Esq., Attorney of West Palm Beach on the questions raised in the original petition and on the questions petitioner had been deprived of his Constitutional rights by reason of not having been permitted to testify in his own behalf, and was not given an opportunity to seek the advice of counsel; that petitioner had been cross-examined but was not theretofore sworn and his wife had not been advised of her rights.

On October 16, 1950, the Court denied petition for rehearing. (R. 33).

B

Reasons Relied On for the Allowance of the Writ

1. That the Supreme Court of the State of Florida and the Circuit Court of the Tenth Judicial Circuit of Polk County, Florida, have so far sanctioned the departure from the accepted and usual course of judicial proceedings by the Criminal Court of Record in and for Polk County, Florida, as to call for an exercise of this Court's power of supervision.

2. That the denial of petitioner's right to be heard either by himself or by counsel was a denial of the rights guaranteed under the Constitution of the State of Florida, under Section 11 of the Declaration of Rights.

3. That the denial of petitioner's right to be heard either by himself or by counsel was a denial of a fair and impartial trial under the laws and the Constitution of the State of Florida and the United States, under the facts of this case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Florida, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 21,183, Joe Maloy, appellant vs. State of Florida, appellee, and that the said Final Judgment of the Supreme Court of the State of Florida, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will every pray.

JOE MALOY,
Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 611

JOE MALOY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

1. Final Judgment and sentence of the Criminal Court of Record in and for Polk County, Florida. (R.).

2. Order of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County, affirming the judgment of the Criminal Court of Record of Polk County, Florida. (R. 17).

3. Order of the Supreme Court of the State of Florida, denying petition for writ of certiorari. *Joe Maloy* v. *State of Florida.* Not reported in So. Rep. (R. 22).

4. Order of the Supreme Court of the State of Florida, denying petition for re-hearing. *Joe Maloy* v. *State of Florida.* Not reported in So. Rep. (R. 33).

II

Grounds of Jurisdiction

1. It is believed that U.S.C.A. 28, Section 344 (a) sustains the jurisdiction of the Supreme Court of the United States in this cause.

2. The date of the Final Judgment of the Supreme Court of the State of Florida, to be reviewed is September 25, 1950. The petition for re-hearing was denied October 16, 1950. (R. 33).

III

Concise Statement of the Case

1. Joe Maloy was arrested for the offense of driving while under the influence of intoxicating liquor under the laws of the State of Florida, on May 7, 1949, and placed in the County Jail of Polk County, Florida, under a $500 bond. On December 13, 1949, he was tried and convicted in the Criminal Court of Record in and for Polk County, Florida, and sentenced to pay a $100 fine or serve 90 days in jail. At the time of his arrest, he was returning a truck with which he had pulled his car out, having merely missed the road and gone into a ditch, in turning too sharply off the Tampa Highway onto the Nichols Cut Off, by two deputies who had first stopped his wife, driving his car ahead of him, and ascertained from her that it was the car which had been in the ditch and he had been driving it; there was no accident nor any damage; up to the time of his arrest, he had drank four bottles of beer—one about 4:30 that afternoon, two while having dinner with Mr. and Mrs. Sam Strange, be-

tween 6:30 and 8 o'clock p.m., and another about 10. At the trial he pleaded "not guilty" and waived trial by a jury; he was not represented by nor asked if he desired counsel; nor is there any testimony in the record by Joe Maloy in his own behalf; at the conclusion of the testimony of one witness for the State the County Solicitor stated he could not find the other, Ben Howell, and "in order to save time" directed Joe Maloy to proceed by the calling of his witnesses, Sam Strange and Ruth Maloy. (R. 6). Ruth Maloy testified, and pointed out, that her husband was a cripple and had been pushed around like a common criminal by the arresting officers and her testimony is uncontradicted; she was not permitted to testify in detail nor did the presiding Judge make inquiry thereto, nor advise she was not compelled to testify against her husband. (R. 10). At the conclusion of the testimony of Sam Strange and Ruth Maloy the Court announced: "We'll wait until Mr. Howell comes in and conclude this the minute Mr. Howell gets here." The case was then set aside and recess called. (R. 12). Preceding such recess the Court had decided: "I think for a working man over that period of time might drink four bottles allright, you couldn't do it right close together but over four or five hours." (R. 12). Following such recess the Court made the following findings of law and fact: "I don't believe a person could drink four bottles of beer and not be guilty of that charge. There's nothing else to do under the circumstances. He realized that he was guilty." (R. 15). Thereafter the case was appealed to the Circuit Court and set down for hearing by petitioner before one of the Circuit Judges, and in his order, dated June 29, 1950, affirming the lower court, said Judge recited that it was agreed by the State Attorney the case be referred to him on the record, without argument. (R. 17). On July 8, 1950, your petitioner filed in his own behalf Notice of Ap-

peal and on August 11, 1950, his record in the Supreme Court. On Monday, August 21, 1950, the Attorney General filed motion to dismiss on the ground that an appeal would not lie in the Supreme Court and set the same down for hearing on Monday, September 18, 1950, contrary to the rules of Court, providing it be heard the following Monday. (R. 21). On September 8, 1950, petition for writ of certiorari was filed on the question the trial court had departed from the accepted and usual course of judicial proceedings in that petitioner had been compelled by the County Solicitor to proceed with his case, before the State had concluded its case; that the County Solicitor still claiming he could not find his witness, a recess was called, following which the presiding Judge had completely reversed himself, found petitioner "guilty" "under the circumstances" and charged him with knowledge of his own guilt; that it appeared from the record he had not been permitted to testify in his own behalf; that after his arrest on May 7, 1949, he had been advised the case had been dismissed, as evidenced by the Information dated July 7, 1949, and had not been tried until December 13, 1949 and that the testimony of the State's witnesses was almost entirely contradictory. That, inadvertently, he had not complied with the rules and neither had the Attorney General and asked to be heard, because had the motion been set down on the following Monday, he would have been advised of his error and requested an extension; said day being the last day for the filing of his petition. Brief and Notice of hearing filed same day. On September 25, 1950, the Court denied the petition. (R. 22). On October 10, 1950, petition for re-hearing was filed by James Nemec, Esq., Attorney of West Palm Beach on the questions raised in the original petition and on the questions petitioner had been deprived of his Constitutional rights by reason of not having been permitted to testify in

his own behalf, and was not given an opportunity to seek the advice of counsel; that petitioner had been cross-examined but was not theretofore sworn and his wife had not been advised of her rights. On October 16, 1950, the Court denied petition for re-hearing. (R. 33).

IV

Specification of Errors

1. That the Supreme Court of the State of Florida erred in finding and holding that the trial court did not depart from the accepted and usual course of judicial proceedings.

2. That the Supreme Court of the State of Florida erred in finding and holding that the decision of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County, should not be reversed.

3. That the Supreme Court of the State of Florida erred in finding and holding that the denial of petitioner's right to be heard, either by himself or by counsel, was a denial of the rights guaranteed under the Constitution of the State of Florida, under Section 11 of the Declaration of Rights.

4. That the Supreme Court of the State of Florida erred in finding and holding that under the facts presented in this case, was not a violation of the due process of our laws, both State and Federal.

V

Argument

Point A

Where a defendant at the trial is compelled "in order to save time" to proceed with his defense by the calling of only his witnesses, before the State has concluded, because of the absence of one of its witnesses, and, for the same reason his case set aside and a recess called and thereafter the court

reverses his former finding; he is cross-examined but not sworn, nor examined directly; he is found guilty and convicted under the circumstances and not the evidence, the court finding: "I am judging him to be guilty of that charge. There's nothing else to do under the circumstances." And further finds: "He realized that he was guilty," despite a plea of not guilty and the defendant was not heard in his own defense, did the trial court depart from the accepted and usual course of judicial proceedings?

That recognized principles of law and rules governing judicial proceedings for the protection of private rights have long been established and that they are necessary for the protection of an accused, is recognized and provided for in our State and United States Constitutions.

Section 12 of the Declaration of Rights of the Constitution of the State of Florida provides: "No person shall be deprived of * * * liberty * * * without due process of law." In the case of *State ex rel Gore* v. *Chillingsworth,* 126 Fla. 645, 171 So. 649, it is held that "Due Process of Law" is defined under this provision of the Constitution as being a guarantee to every citizen right to have that course of judicial proceeding which has been established in judicial system for protection and enforcement of private rights and contemplates that defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure before judgment is rendered against him.

Section 1 of the Due Process Clause of the 14th Amendment of the Constitution of the United States provides: "* * * nor shall any State deprive any person of * * * liberty * * * without due process of law." Under this section in the case of *State* v. *Bates,* 47 P. 78, 414 Utah 300, 43 L. R. A. 33 it is held that: Due Process of Law in a criminal case requires * * * the accused must be given his day in court. His trial must proceed according to established procedure, con-

sisting of rules of pleadings and practice. The admission of evidence for and against him must be according to established rules and he must be convicted by the judgment of a competent court. The definition of the offense and authority for every step in the trial, must be found in the law of the land. Nothing essential can emanate from arbitrary power. The rights of the defendant and the duty of the court are equally under the finger of the law.

It can be safely said that the trial court proceeded at the trial of this case in total disregard of these provisions and the decisions thereunder. Petitioner did not have that course of judicial procedure which has been provided for by State and Federal Constitutional provisions and guaranteed to every citizen under Sec. 12 of the Constitution of the State of Florida as a matter of right and long established in judicial system for protection and enforcement of private rights, nor allowed to defendant his case in an orderly procedure before judgment was rendered against him, as held necessary in the case of *State ex rel Gore* v. *Chillingsworth, supra,* but was compelled to proceed with the defense of his case before the State had concluded its case and to thus proceed by the calling of his witnesses and only them; at the trial of this case petitioner was cross-examined but was not theretofore sworn nor did he testify on direct examination, so that the admission of evidence for and against him was not according to established rules, held necessary in the case of *State* v. *Bates, supra,* and wherein it is held that authority for every step in the trial, must be found in the law of the land and that the rights of the defendant and the duty of the court are equally under the finger of the law.

Section 11 of the Declaration of Rights of the Constitution of the State of Florida provides: "In all criminal prosecutions, the accused shall have the right to a • • •

public trial * * *". This section is defined and upheld in the case of *Griswold* v. *State,* 77 Fla. 505, 82 So. 44, in which the court said: "The 11th section of the Declaration of Rights * * * provides that * * * in all criminal prosecutions the accused shall have the right to a speedy and public trial. It is universally conceded that the above and similar provisions in the Constitution of our states involves fundament rights and is of general interest. By such provisions the State has covenanted with each inhabitant that no one's life or liberty shall be taken upon a mere charge of crime"

It is held that an accused has the right to a public trial in the case of *Haddock* v. *State,* 141 Fla. 132, 192 So. 802 and in construing this provision in the case of *Holton* v. *State,* 2 Fla. 476, the court went even further and held that the whole of the trial must be public. It was held that a trial judge should not permit private conferences with them in respect to any issue arising on the trial of a criminal cause by the prosecuting attorney or anyone else in the case of *Pearden* v. *State,* 465 Fla. 124, 35 So. 204. In this case the court said: "Defendants in criminal cases have the right to a speedy, public trial and to be fully appraised of everything in any manner affecting their rights at such trial, and it entrenches close upon an invasion of such rights to have the judge pass upon any question affecting their trial upon undisclosed facts within the secret knowledge of the judge, or secretly communicated to him by others.

Petitioner's trial was not public, or wholly public, as provided in our Constitution and held necessary in these decisions thereunder, the County solicitor having caused the case to be set aside because he could not find his missing witness and a recess called. The defendant was not fully appraised of everything in any manner affecting his rights, nor did the trial judge refrain from private conference with the county solicitor or someone else as held necessary in the

case of *Pearden* v. *State, supra,* something having occurred and was said during said recess of which he was not aware and of which he had no knowledge, whereby the court had knowledge of a fact not disclosed to him, so that the court reversed his former finding: "I think for a working man over that period of time might drink four bottles all right, you could not do it right close together but over four or five hours." And, thereafter, made the following findings of law and fact: "I don't believe a person could drink four bottles of beer and not be guilty of that charge. I am judging him to be guilty of that charge. There's nothing else to do under the circumstances. He realized that he was guilty."

The finding of the court that petitioner realized his guilt, is a denial of his plea of not guilty and charges him with knowledge of his guilt by reason of having been charged with the offense, contrary to the decision in *Griswold* v. *State, supra,* wherein, in construing Sec. 11 of the Declaration of Rights it was held that by such provision the State has covenanted with each inhabitant that no one's liberty shall be taken upon a mere charge of crime.

In the case of *Dutiel* v. *State,* 284 N. W. 321, 135 Neb. 811, it was held that "Due Process of Law" in criminal cases requires * * * the right to be discharged unless found guilty. The finding of the trial court in this cause, was a finding that he had not found petitioner guilty under the evidence produced by the State of Florida, and, as held in the case of *Dutiel* v. *State, supra,* "he had the right to be discharged."

POINT B

Where a man has been arrested, is not tried until more than 7 months have elapsed, on an information dated 2 months thereafter; is not permitted to testify in his own behalf or given an opportunity to seek the advice of coun-

sel, did he receive a fair and impartial trial under the Due Process Guarantee of our Federal Constitution and the Constitution of the State of Florida?

It has been repeatedly held that an accused has the right to a speedy trial. It was held in the case of *Griswold* v. *State, supra,* in construing the 11th Section of the Declaration of Rights that an accused has the right to a speedy trial, and in the case of *Haddock* v. *State, supra.* Petitioner cannot be said to have had a speedy trial. He was arrested on May 7, 1949 and tried on December 13, 1949.

At the trial of this cause, petitioner was not represented by nor was inquiry made if he desired counsel. The right of an accused to the services of an attorney has been well settled by this Court in the case of *Donald Wade* v. *Nathan Mayo, as State Custodian of the State of Florida,* 92 Law Ed. 672.

The petitioner was denied his right to be heard by himself at the trial of this cause, and it has been repeatedly held that such a denial is to deny an accused the right guaranteed under the Declaration of Rights of the Constitution of the State of Florida and the Due Process of Law provision of the Constitution of the United States.

The constitutional provision in the State of Florida provides: "Sec. 11. In all criminal prosecutions, the accused shall have the right to * * * and shall be heard by himself, or counsel, or both * * * *". In construing this constitutional provision, our Supreme Court has said: "Fundament rights of a person charged with an offense * * * must be respected and observed by officers when enforcing criminal laws." *Walker* v. *State,* 150 Fla. 476, 8 So. (2nd) 22.

In the case of *Deeb* v. *State,* 131 Fla. 632, 179 So. 894, it was held that requirements of this section that accused be heard by himself or counsel or both is more than right

secured to accused, and is a mandatory organic rule of procedure in all criminal prosecutions. In this case the court said: "The provisions of the Constitution that in all criminal prosecutions the accused shall have stated particular rights include an express specific command that the accused 'shall be heard by himself, or counsel, or both'. These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the laws; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the State.

"Requirements by this section that accused be heard by himself or counsel or both cannot be evaded, and full benefit thereof should not be denied by too strict an application of judicial or statutory rules of evidence or of procedure." *Deeb* v. *State,* 131 Fla. 362, 179 So. 894.

In the case of *Deeb* v. *State,* (Fla.) 179 So. 894-895, the Supreme Court held: "The provisions of the Constitution that in all criminal prosecutions the accused shall have stated particular rights include an express specific command that the accused 'shall be heard by himself * * *.' These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the laws; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of the Constitution that 'in all criminal prosecutions, the accused * * * shall be heard by himself' is more than right secured to an accused. It is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State.

Section 1 of the Due Process of Law clause of the 14th Amendment of the Constitution of the United States provides: "* * * Nor shall any state deprive any person of

* * * liberty * * * without due process of law." Under this section in the case of *State* v. *Bates*, 47 P. 78, 414 Utah 300, 43 L. R. A. 33, it is held that: Due Process of Law in a criminal case requires * * * the accused must be given his day in court.* * *"

Conclusion

It is respectfully pointed out that the order of the Supreme Court of Florida, denying the petition for writ of certiorari is upon an inspection of the record, and, inasmuch as said petition sets forth facts which it was thought were substantiated by the record and should be brought to the attention of the Court, it is not included in this record, and the date of filing thereof having been inadvertently omitted, petitioner leaves it to the discretion of this Court whether or not it is necessary for the adjudication of this cause.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the judgment and sentence of the trial court may be reversed and dismissed and the petitioner discharged and to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Florida and finally reverse it.

Respectfully submitted,

JOE MALOY,
Petitioner.